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Supreme Court of the United States

October Term, 1951

No. 212

AMERICAN ELASTICS, INC.,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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49

INDEX

Subject Index

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Specifications of Errors to be Urged	17
Reasons for Granting the Writ	17
Conclusion	18

Citations

Cases:

American Elastics, Inc. v. United States of America, 84 F. Supp. 194, 187 F. 2d 109	1
Arthur Philip Export Corp. v. Leathertone, Inc., 275 App. Div. 102 (1st Dept., 1949)	2, 7
Bemis Bros. Bag Co. v. U. S., 289 U. S. 28	18
Bull v. U. S., 295 U. S. 247	18
Croninger v. Crocker, 62 N. Y. 151	2
Cudahy Packing Co. v. Narzisenfeld, 3 F. 2d 567 (C. C. A. 2, 1924)	8, 10
King v. Knapp, 59 N. Y. 462	10
Lumbrazo v. Woodruff, 256 N. Y. 92 (1931)	8
Morris Run Coal Co., Inc. v. Carthage Sulphite Pulp & Paper Co., Inc., 210 App. Div. 678, aff'd 242 N. Y. 567	10
Navarette v. Travis-Ziegler Co., Inc., 194 N. Y. Supp. 832	9

PAGE

Pope v. Allis, 115 U. S. 383 11

Ruben v. Lewis, 20 Misc. 583 10

Sachs Mercantile Co. v. U. S., 78 Ct. Cl. 801 11
Samuel, M. & Sons v. U. S., 61 Ct. Cl. 373 12
Schwartz v. Kohn, 155 N. Y. Supp. 547 11
Seneca Wire & Mfg. Co. v. A. B. Leach & Co., Inc., 274 N. Y. 1 12
Shephard v. Kain, 5 Barn. & Ald. 240, 106 Eng. Repr. 1180 11
S. Snyder Corp. v. U. S., 68 Ct. Cl. 667 11
Sturtevant Co. v. Fireproof Films Co., 216 N. Y. 199 .. 2

Tucker v. Alexander, 275 U. S. 228 18

Union Mutual Life Ins. Co. v. Friedman, 139 F. 2d 542 (C. C. A. 2, 1944) 3, 15
U. S. v. Koplin, 24 F. 2d 840 11

Yellow Truck & Coach Mfg. Co. v. Edmondson, 155 F. 2d 367 (C. C. A. 6, 1946) 16

Statutes

New York Personal Property Law, Secs. 95, 152 ..... 2, 8

Title 28, United States Code:
Section 1254 2
Section 2106 16

Miscellaneous

Williston on Sales, 2nd Ed., Sec. 631 12

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, in the case entitled "*American Elastics, Inc.* v. *United States of America*" wherein judgment of affirmance was rendered on February 20, 1951, and rehearing denied on March 13, 1951.

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported at 84 F. Supp. 194 (Rifkind, *D. J.*, Jan. 19, 1949). The opinion of the United States Court of Appeals for the Second Circuit is reported at 187 F. 2d 109 (opinion by Judge Chase).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 20, 1951 (R. p. 143). Appellant's petition for rehearing was denied on March 13, 1951 (R. p. 149). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254. The time for filing petition for certiorari was extended to and including August 1, 1951, by order of Mr. Justice Jackson, dated May 18, 1951.

Questions Presented

1. Whether a contract to purchase war surplus goods from the United States is governed by the doctrine of "*caveat emptor*" where the sale is by sample and description and the goods delivered (a) do not correspond with the sample or description, (b) are concededly of no market value and worthless, and (c) the purchaser is deprived by the Government's conduct of information supplied to all competing bidders. N. Y. Pers. Ppty. Law, Secs. 95, 152.

2. Whether the decision of the court below is not in conflict with the well established law of New York denying effect to clauses printed on the reverse side of a contract and not incorporated by reference in the body of the contract. *Arthur Philip Export Corp.* v. *Leathertone, Inc.*, 275 App. Div. 102 (N. Y. App. Div. 1st Dept., 1949); *Sturtevant Co.* v. *Fireproof Films Co.*, 216 N. Y. 199.

3. Whether the decisions of the courts below holding that a buyer who receives from the seller goods not conforming to the contract mixed with goods conforming to the contract is required to segregate the conforming goods from the non-conforming goods, are not in conflict with the well established law of New York which imposes that duty upon the seller. *Croninger* v. *Crocker*, 62 N. Y. 151, 157.

4. Whether the decision of the United States Court of Appeals for the Second Circuit is not in conflict with the decisions of the several Courts of Appeal in respect to the meaning of Rule 2 of the Rules of Civil Procedure for the District Court of the United States which provides that there shall be one form of action, to be known as "civil action". The Court applied the doctrine that there must be a specific form of pleading of breach of contract and denied recovery for a conceded breach of contract on the ground that petitioner "sought no recovery upon such a theory" (R. p. 142). *Cf. Union Mutual Life Ins. Co.* v. *Friedman*, 139 F. 2d 542 (C. C. A. 2, 1944).

Statement

This action was commenced by American Elastics, Inc., a New York Corporation, in the United States District Court for the Southern District of New York against defendant United States of America for the recovery of $6,750 paid by plaintiff to the Government as the purchase price of certain elastic webbing under the so-called "Chicago" contract. The Government counterclaimed for an unpaid balance of $591.20 under a different contract of purchase of elastic webbing known as the "Troy" contract. Thereupon the plaintiff counterclaimed for $3,417.20, the amount it had paid to defendant for merchandise under the Troy contract.

The District Court dismissed the complaint, the defendant's counterclaim and the plaintiff's counterclaim (fols. 300-301), and after entry of judgment in accordance therewith, denied plaintiff's motion for a new trial and granted in part plaintiff's motion for a correction of certain statements in the opinion (fol. 379). Both sides appealed (fols. 382-390), and thereafter the defendant withdrew its cross appeal (fols. 394-396).

The Chicago Contract

On or about September 12, 1944, the defendant's Chemical Warfare Service wrote to the plaintiff offering for sale merchandise "located at Keokuk, Iowa", described as: "15,000 lbs. elastic webbing, head harness, grey color, in 200 # bales. Head harness composed of three crossing, sewn straps, each 15" long with clinch tips on each end; webbing has had warehouse storage, is clean, dry and straight. It is to be noted that the crossing of the straps is not bound by a pyroxylin coated cloth centerpiece" (fols. 72-75 incl.).

Plaintiff's negotiations for this merchandise resulted in a contract (fol. 85) which the Government shortly thereafter cancelled with a view toward obtaining "a more satisfactory price" (fols. 97, 102).

The cancelled contract contained a statement that the purchaser "agrees to accept all property purchased hereunder 'as is' at the time of delivery".

Thereafter, on or about October 18, 1944, the defendant's Chemical Warfare Service advised plaintiff that the merchandise had been "declared" to the Treasury Department for sale (fols. 99-100). On October 30, 1944, plaintiff wrote to the Treasury Department for "full information" on the material (fols. 111-113 incl.), to which the Treasury replied that it had "15,000 pounds head harness elastic webbing located Keokuk, Iowa" (fol. 114). Plaintiff wrote requesting the Treasury Department to "please mail sample" (fol. 116). In reply, on November 8, 1944, the Treasury wrote to plaintiff: "Enclosed you will find two samples of the above item mentioned" (fols. 117-118). The samples furnished were 15" lengths of elastic in clean, dry and straight condition without pyroxylin centerpieces (fol. 120). In response plaintiff offered 45¢ per pound by letter to the Treasury dated November

14, 1944 (fols. 121-122). On December 5, 1944, the Treasury awarded the purchase to plaintiff (fol. 134) and on December 14, 1944, forwarded the contract to plaintiff for signature with request for payment (fols. 144-145).

The clean, dry and straight samples of elastic which the Treasury Department furnished to the plaintiff by letter dated November 8, 1944, had been taken by it from 10 lbs. of samples received by the Treasury Department from the Dryden Rubber Co., Keokuk, Iowa (fol. 119). Unknown to the Treasury Department at that time, the samples represented only a small percentage of the entire lot (fols. 110, 335).

By November 20, 1944 after receiving but before accepting plaintiff's bid, the Treasury Department learned of its error and circulated a revised description of the merchandise to 84 dealers, but not to the plaintiff (fols. 152-158 incl.), in which it described the merchandise not as "clean, dry, and straight", as it had to plaintiff, but as "⅞" used elastic head-harness from gas masks in three crossing strips sewed together. Has iron clinch tip on each of six ends. Condition Soiled" (fol. 156). This offer was "held open until December 1, 1944" (fol. 153) and elicited a highest bid of 22¢ per lb. (fol. 138). Meanwhile, withholding the revised description from the plaintiff, the Treasury urged the plaintiff "to increase your bid" (fol. 128). Since plaintiff's bid was more than double the bid of the highest bidder who knew of the revised description and virtually double the defendant's own appraisal of the merchandise (fol. 108), the Treasury Department signed a contract with the plaintiff (fol. 150, fold 3).

In the invitation circular, the "condition" of the goods had been described to 84 dealers, but not to the plaintiff, as "soiled". In the contract, for the "condition" of the goods, which the Government had described to plaintiff as

clean, dry and straight, the Government substituted for "condition—Soiled" of the invitation circular, the code "condition—6".

The United States Attorney conceded at the trial that "condition—6" "is apparently some code description which is apparently not intended to be known by Mr. Weinman (President of plaintiff). * * *"

Plaintiff signed the contract (Ex. 33) on the face and returned it with plaintiff's check for $6,750. On the reverse side of the contract, not referred to or incorporated in any manner by the language on the face of the contract, were numerous conditions, including an "as-is, where-is" clause.

The contract was executed in five copies, each copy having on its face side the notation "Sheet No. 1 of 1 sheets" and none of the copies was signed by the plaintiff on the reverse side (fol. 151).

On January 8, 1945, the plaintiff received the shipment and upon inspection found that the goods were "dirty, stained, curled, twisted and wrinkled and the crossing of the straps is bound by a pyroxylin coated cloth centerpiece" (fols. 175-177) and on the very same day so advised the Treasury by letter. The uncontradicted proof in the record is that, as delivered, the merchandise had a fair market value of zero (fol. 180).

The District Court held that the goods delivered corresponded to the description; that the goods did not correspond to the sample but that under the Personal Property Law of New York the Government was not required to deliver goods corresponding to the sample because of the "as is" disclaimer. The District Court was silent in its opinion as to how the "as is" clause on the reverse side of the contract, not incorporated by reference in the body

of the contract, governed the rights of the parties. The District Court dismissed the complaint.

The United States Court of Appeals affirmed, inferring that the Trial Judge had surmised that plaintiff was aware of the existence of the "as is" disclaimer on the reverse side inasmuch as plaintiff had executed a different form of contract with the Government several months before which contract contained a different form of "as is" disclaimer. Moreover, the Court of Appeals noted that three days after the signing of the contract the Government in a letter to the purchaser directed the purchaser's attention to the existence of the conditions on the reverse side of the contract, and the purchaser made no objection thereto. It is quite obvious, however, that the contract had been signed and the consideration paid before such notice of the existence of the conditions was brought to the plaintiff's attention.

The inferences and surmises of the Court that plaintiff had knowledge of the existence of the "as is" disclaimer on the reverse side of the contract are completely repugnant to the controlling decisions of the New York courts and astounding in view of defendant's stubborn disregard of every moral as well as legal obligation in order to hold on to plaintiff's money.

Arthur Philip Export Corp. v. *Leathertone, Inc.*, 275 App. Div. 102, 87 N. Y. S. (2d) 665 (1st Dept. 1949):

> "• • • The clause was one of some ten paragraphs printed on the reverse side of that order, not signed by any officer of respondent and merely had the printed name of respondent at the bottom. Respondent does not claim that the provisions on the reverse side of its communication were called to appellant's attention other than by the legend on the face thereof, in small type and in parenthesis, stating '(See also back).' An inspection of the actual

exhibit shows that the legend is in an inconspicuous place. There is no other reference or suggestion on the face of the form that the transaction is subject to the terms and conditions set forth on the reverse side.

"A party should not be bound by clauses printed on the reverse side of a document unless it be established that such matter was properly called to its attention and that it assented to the provisions there stated. Blossom v. Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Klar v. H. & M. Parcel Room, Inc., 270 App. Div. 538, 543, 61 N. Y. S. 2d 285, 289, aff'd 296 N. Y. 1044, 73 N. E. 2d 912; Dery v. Blate, 209 App. Div. 467, 471, 205 N. Y. S. 15, 19, aff'd 239 N. Y. 203, 146 N. E. 204. * * *"

Even conceding, *arguendo,* that the "as is" clause was a part of the contract, the dismissal of the complaint was unwarranted although it is doubtless true, as the court held below, that parties may negative a warranty that the goods will correspond with the sample.

New York Personal Property Law, Section 152; *Lumbrazo* v. *Woodruff,* 256 N. Y. 92 (1931).

However, the courts have long recognized that an "as-is" clause will not protect the seller in a sale by sample where the sample was not selected honestly by the seller, or where the merchandise delivered was of unmerchantable quality of no market value to the buyer.

In *Cudahy Packing Co.* v. *Narzisenfeld,* 3 F. 2d 567, C. C. A. 2, 1924, the U. S. Court of Appeals, per Rogers, *J.,* said:

"The maxim of *caveat emptor* embodies an ancient rule of the common law. It is based on the principle that the purchaser buys at his own risk unless the seller gives an express warranty, or un-

> less the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in a material inducement to the sale. * * * " (at p. 570).

And in *Navarette* v. *Travis-Ziegler Co., Inc.,* 194 N. Y. Supp. 832, Judge Spiegelberg analyzed the meaning of an "as-is" clause as follows:

> " * * * The grapes were sold 'as are'. The seller so stated. He said in substance to the buyer:
>
> " 'The grapes which I am about to sell may be better or worse than those on exhibition. You have to take your chances. *What I guaranty is that the samples have been honestly selected*' " (at p. 836). (Italics added.)

The instant case is directly within the rule expressed in the above quoted cases. The samples exhibited to the plaintiff were not honestly selected. The files of the defendant disclosed, and the defendant conceded (fols. 110, 119, 335) that the samples furnished to plaintiff represented only a small percentage of the entire lot, the balance of which consisted of elastic which had been salvaged from used equipment. It further appeared that the defendant learned by not later than November 20, 1944 (fols. 152-158) that the merchandise sold was in "soiled condition" and so advised 84 dealers, but not the plaintiff, but nevertheless induced plaintiff to contract on the basis of clean, dry and straight samples which had been furnished to plaintiff on November 8, 1944, as "two samples of the above item mentioned" (fol. 118).

Not alone were the samples dishonestly selected, thus rendering *"caveat emptor"* inapplicable, but the contract was induced by fraudulent misrepresentation and concealment in a material inducement to the sale. Consequently,

within the rule expressed in *Cudahy Packing Co.* v. *Narzisenfeld, supra,* the maxim of *"caveat emptor"* was inapplicable.

The New York Court of Appeals held in *King* v. *Knapp,* 59 N. Y. 462, 468:

> "We think the Judge at Special Term should have found these facts as requested, and should have held that a bid obtained by the suppression of a fact so material to the value of the lot could not be enforced."

See also *Ruben* v. *Lewis,* 20 Misc. 583, 46 N. Y. Supp. 426.

The leading New York case on the subject is *Morris Run Coal Co., Inc.* v. *Carthage Sulphite Pulp & Paper Co. Inc.,* 210 App. Div. 678, 206 N. Y. Supp. 676, aff'd 242 N. Y. 567. In that case the plaintiff (seller) sued for the purchase price of ten carloads of anthracite coal screenings. The contract of purchase contained the following clause:

> "It is understood and agreed that you will accept 'as is' coal shipped upon the order above referred to."

The defendant resisted the action claiming a breach of warranty. The Court held that the judgment for the plaintiff must be reversed and a new trial ordered. The Appellate Division said:

> "Counsel for the defendant asked to go to the jury on the question of a breach of warranty. He was here clearly within his rights, for such a question was involved under the evidence. Howell v. Wright, 122 N. Y. 667, 25 N. E. 912.
>
> "Even though the screenings were bought 'as is', still there was a representation that they were

> 'good' screenings. They were known to be purchased for use in the defendant's furnaces, and the representation that they were 'good,' together with their sale for a known use, was a warranty that they were usable for the purposes for which they were sold. Personal Property Law, Secs. 95, 96 (as added by Laws 1911, c. 571); Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595; Prentice v. Fargo, 53 App. Div. 608, 65 N. Y. S. 1114. The jury should have been allowed to pass on the question of the alleged breach of warranty."

Upon appeal to the Court of Appeals the court unanimously affirmed and entered judgment absolute against the plaintiff-seller.

To the same effect are *Shephard* v. *Kain,* 5 Barn. & Ald. 240, 106 Eng. Repr. 1180; *Pope* v. *Allis,* 115 U. S. 363; *U. S.* v. *Koplin,* 24 F. 2nd 840; *Schwartz* v. *Kohn,* 155 N. Y. Supp. 547.

The Court of Claims cases and the reported decision of this Court cited by Judge Chase in his opinion are not contrary to the above decisions. In those cases, as an integral part of the contract there was a lengthy disclaimer of all warranties and an express caution to bidders that they must make examination of lots before the sale and that no allowance will be made on account of any difference between the sample and the lot.

Sachs Mercantile Co. v. *U. S.,* 78 Ct. Cl. 801.

In *S. Snyder Corp.* v. *U. S.,* 68 Ct. Cl. 667, the Government proved that its selection of samples had been fair and true. In the present case there is only the surmise that the Government failed to send the revised description containing the word "soiled" to the plaintiff because the plaintiff had already submitted a bid, whereas 84 other prospects had not submitted bids. No proof other than

the speculation as to the evidence was made by the Government. In *M. Samuel & Sons* v. *U. S.*, 61 Ct. Cl. 373, the Court expressly said:

> "The Government acted in good faith, and there is no charge or proof of bad faith. It was not its purpose to mislead prospective purchasers, and the material was described and sold for what the Government really believed it to be. * * * "

However, in the case at bar, the record is replete with proof of the defendant's bad faith and explicit on the point that the Government sold the elastic webbing to the plaintiff as clean, dry and straight when it had represented to 84 other persons that the goods were soiled and known by defendant to be soiled.

It is respectfully submitted, therefore, that the Courts below erred in their interpretation of the controlling law of New York and erroneously held that *"caveat emptor"* applied when in truth that doctrine had no application by reason of the fact that the goods delivered had no value and the contract for the purchase was induced by material misstatements and omissions to state the true condition of the merchandise, which was known to the defendant.

Moreover, even assuming that the Government acted innocently in misrepresenting the condition of the merchandise, its innocent misrepresentation would under the law of the State of New York have constituted sufficient ground for rescission by the plaintiff.

Seneca Wire & Mfg. Co. v. *A. B. Leach & Co.*, 247 N. Y. 1;
Williston on Sales, Second Edition, Section 631.

It cannot be the law that the mere existence of an "as is" clause protects the seller, even the Government, in the case of a sale by sample and description, when the uncon-

troverted evidence shows that the seller knew the sample to be not representative and the description to be incomplete. Certainly the law has grown sufficiently to strike down and condemn anachronistic concepts even when masquerading under the ancient doctrine of *"caveat emptor"*. The curse of misrepresentation is not removed by the mere insertion of an "as is" clause; justice requires more than the magic of words.

The Troy Contract

In April, 1945, the New York office of the Chemical Warfare Service offered plaintiff a quantity of elastic webbing material represented to be clean pieces about 16" long stitched together, without pyroxylin webbing sewn on. A sample was physically delivered to plaintiff. A contract was executed on May 7, 1945, by which plaintiff agreed to purchase the elastic webbing at 40¢ a pound which accumulated at Cluett, Peabody & Co. in Troy for a 90-day period. Plaintiff paid a deposit of $1,500 and the contract was executed. Plaintiff received shipments on May 14 and May 18, 1945 for which it paid on May 17 and May 21, 1945, respectively. After the second shipment arrived both lots were inspected by plaintiff and found not to be as represented, but to be dirty, with pyroxylin coated centerpieces and mixed with much foreign matter, resembling sweepings, which was of no value.

Plaintiff notified defendant that the shipments were not in accordance with the contract, offered to return them, and demanded the return of its money. The Government told plaintiff that the next lot would be as represented. On June 1, 1945, the third shipment was received and on inspection proved not to be as represented, and plaintiff complained. On June 18, 1945, a fourth shipment arrived and was of the same character. Defendant inspected the mer-

chandise and offered plaintiff a credit for a portion conditioned on plaintiff's segregating useful from the useless goods. Plaintiff rejected the condition for the reason that it did not have the facilities to salvage the goods.

On July 24, 1945, plaintiff paid for the third and fourth shipments deducting the $1,500.00 deposit. On July 31, 1945, defendant delivered another lot of useless material which plaintiff rejected, the price of which was the amount demanded in the defendant's counterclaim.

The Trial Court dismissed the defendant's counterclaim and the defendant appealed (fols. 301, 389). The defendant thereafter withdrew its appeal (fol. 395) leaving as the only issue the plaintiff's right to the return of the purchase price.

The District Court found that the evidence was sufficient to establish that a lot of metal goods, ear pieces, mouth pieces and rubber tubes were present and that plaintiff made timely rejection of the shipment of July 31, 1945, but nevertheless erroneously held that plaintiff's failure to segregate the useless from the useful goods prevented a recovery by plaintiff on this aspect of the complaint.

The District Court further held that the presence of the "as is" disclaimer did not bar plaintiff's rejection of the useless goods.

The Court of Appeals affirmed but did not place its holding upon the same ground as the District Court. The Court of Appeals held that payment by the plaintiff for the non-conforming goods did not preclude recovery of damages for the breach by the Government of the contract. Judge Chase said (187 Fed. Rep. 2d Series, p. 114):

> "While this (payment) precludes recovery of the purchase price by rescission, the acceptance of the goods, accompanied as it was by the assertion of

> the right to a credit, did not bar the recovery of damages for the breach of the contract. Southern Gypsum Co. v. United Paperboard Co., supra; Herbrand Co. v. Lackawanna Steel Co., 6 Cir., 280 F. 11; New York Personal Property Law Sec. 130; Uniform Sales Act Sec. 49. Cf. Lamborn v. Northern Jobbing Co., 7 Cir., 15 F. 2d 897, 898, 899. However, the appellant sought no recovery upon such a theory and failed to prove what damages had been sustained." (Matter in parenthesis added.)

It is respectfully submitted that the foregoing quotation from the opinion contains two errors:

(a) that the theory of plaintiff's complaint precludes recovery of damages for breach of contract when Rule 2 of the Rules of Civil Procedure provides that there shall be one form of action known as "civil action."

(b) that plaintiff failed to prove the damages which had been sustained.

The Court denominated the cause of action as an action for rescission and held that rescission could not lie in view of payment for and acceptance of the merchandise. However, even a mistake in the form of relief requested should not have barred the Court of Appeals from granting judgment for the plaintiff in accordance with the merits of the factual situation alleged in the complaint.

In *Union Mutual Life Ins. Co.* v. *Friedman,* 139 F. 2d 542 (C. C. A. 2, 1944) the plaintiff sued to rescind an insurance contract on the ground that false statements in the application allegedly had been made by the defendant. Plaintiff had paid $27,800 in disability payments to the defendant. In the complaint the plaintiff demanded that the policy be rescinded and that there be granted to it a money judgment for $27,800 and interest. The District Court held that there was an adequate remedy at law and

dismissed the complaint. The Court of Appeals reversed in an opinion by Judge Augustus N. Hand and said at page 544:

> "The plaintiff appeals (1) on the ground that the complaint should not have been dismissed for failure to state a case for equitable relief, since it, in any event, set forth a claim at law for the recovery of moneys obtained through fraud; * * *"
>
> * * *
>
> "We have no doubt that the appeal must be sustained on the first ground."
>
> * * *
>
> "The defendant argues that we ought not to hold that the complaint stated a claim at law because the question whether the pleading set forth a claim at law was not raised in the court below. We have nothing, however, but the assertion of the defendant in the argument of his counsel (an assertion which the plaintiff's counsel controverts) that this point was not made below. Moreover, irrespective of whether the question was raised below, we should not be justified in depriving the plaintiff of its right because it mistook the nature of its remedy. Cf. Hormel v. Helvering, 312 U. S. 552, 61 S. Ct. 719, 85 L. Ed. 1037."

See also *Yellow Truck & Coach Mfg. Co.* v. *Edmondson*, 155 F. 2d 367 (C. C. A. 6, 1946).

Assuming that the plaintiff should recover for breach of contract, the decision below that damages were not proved is unsupported in the record. The testimony was replete with evidence that there was practically no salvage in the material for which the plaintiff paid $3,417.20. At worst, the Court should have remanded the case for further proof on the subject under Title 28, Section 2106.

Specifications of Errors to Be Urged

The Court of Appeals erred:

1. In affirming the judgment below that the Government was not obliged to deliver merchandise in accordance with the samples furnished in the Chicago and Troy contract transactions.

2. In affirming the judgment below that the "as is" disclaimer clause in the Chicago contract contained on the reverse side of the contract and not incorporated by reference was binding on the plaintiff.

3. In affirming the judgment below that a war surplus Government contract is governed by the doctrine of *"caveat emptor"* where samples of the merchandise unrepresentative of the bulk and known by the Government to be unrepresentative are the basis for obtaining the purchaser's bid.

4. In affirming the judgment below that the breach of contract by the Government in the Troy transaction was not compensable to the plaintiff because it mistook the remedy, despite the provisions of Rule 2 of the Rules of Civil Procedure.

Reasons for Granting the Writ

1. The decision of the Court of Appeals is the only reported decision on the relationship between citizen and sovereign in respect of purchases of war surplus growing out of World War II. It is important that the rights of the parties to such purchase and sales contracts should be defined in an opinion of the highest court of the land. It is important to establish whether the Government may be excused from observing at least that degree of business morality which exists among business men in the market place, by reason of the claimed necessity of speedily transacting and consummating a large amount of business in surplus goods.

The decisions of this Court and of lower courts have consistently held that in the contractual relationship between sovereign and citizen there is a duty on the sovereign to cut "square corners" and that governmental prescriptions, whether contained in statutes, regulations or forms of government contracts shall not be "traps for the unwary."

Tucker v. *Alexander*, 275 U. S. 228.

Certainly this Honorable Court has found ways and means of protecting the citizen from arbitrariness or abuse at the hands of the Government or its agents.

Bull v. *U. S.*, 295 U. S. 247;
Bemis Bros. Bag Co. v. *U. S.*, 289 U. S. 28.

2. The decisions of the courts below are in conflict with the established law governing the sale of goods as found in the case and statute law of the State of New York and of the various states.

3. The decisions of the courts below reinstate adherence to the form of action and the technicalities of pleading formerly regarded as significant but which have been discarded in the adoption of Rule 2 of the Rules of Civil Procedure providing for the establishment of one form of action, namely, the civil action. The right of recovery existed irrespective of whether the allegations concerning the Troy contract were framed in rescission or in breach of contract.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
1. *The "Chicago" Contract*	3
2. *The "Troy" Contract*	6
Argument	9
1. *The "Chicago" Contract*	10
2. *The "Troy" Contract*	14
Conclusion	17

Cases:

Arthur Philip Export Corp. v. *Leathertone, Inc.*, 275 App Div. 102, 87 N.Y.S. 2d 665	11
Clearfield Trust Company v. *United States*, 318 U. S. 363	10
Comstock v. *Group of Investors*, 335 U. S. 211	9
Croninger v. *Crocker*, 62 N. Y. 151	14, 15
Sturtevant Co. v. *Fireproof Film Company*, 216 N. Y. 199	11
United States v. *Allegheny County*, 322 U. S. 174	10
United States v. *Dickinson*, 331 U. S. 745	9
United States v. *Jones*, 176 F. 2d 278	10

Statutes:

New York Personal Property Law:	
Section 125	15
Section 152	12
Uniform Sales Act:	
Section 44	15
Section 71	12

Miscellaneous:

Federal Rules of Civil Procedure:	
Rule 2	2

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 212

AMERICAN ELASTICS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 86) is reported at 84 F. Supp. 194. The opinion of the United States Court of Appeals for the Second Circuit (R. 135) is reported at 187 F. 2d 109.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1951 (R. 143). A petition

for rehearing, filed on March 7, 1951 (R. 143), was denied on March 13, 1951 (R. 149). On May 18, 1951, the time for filing the petition for certiorari was extended until August 1, 1951 (R. 150), and the petition was filed on July 30, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court and the court of appeals properly held that conditions printed on the reverse side of a form contract for the sale of surplus property constituted a part of that contract.

2. Whether, in the circumstances of this case, the district court and the court of appeals properly held that petitioner had waived its right to reject certain delivered goods and had failed to prove damages for breach of contract.

STATEMENT

Petitioner, a dealer in elastic material, brought this action to recover monies paid by it to the United States as the purchase price of elastic webbing material under a contract referred to as the "Chicago" contract (R. 3-9). The United States counterclaimed for the unpaid balance of the purchase price of elastic sold to plaintiff under another contract called the "Troy" contract (R. 12). Petitioner thereupon counterclaimed for all monies it had paid to the Government under the "Troy" contract (R. 15-19). Petitioner asked for

rescission of both contracts for mutual mistake of fact or breach of warranty in a sale by description and by sample. The case was tried upon a stipulation of facts as to the "Chicago" contract and upon the deposition of the president of petitioner as to the "Troy" contract. The facts are as follows:

1. *The "Chicago" Contract.*

The Government, through the Chemical Warfare Service, United States Army, offered for sale 15,000 pounds of elastic material located at the Dryden Rubber Company's factory at Keokuk, Iowa (R. 23-24). The offer was contained in an invitation letter in which the goods were described (R. 25) as:

> 15,000 lbs. elastic webbing, head harness, grey color, in 200# bales. Head harness composed of three crossing, sewn straps, each 15" long with clinch tips on each end; webbing has had warehouse storage, is clean, dry, and straight. It is to be noted that the crossing of the straps is not bound by a pyroxylin coated cloth centerpiece.

Petitioner bid 78¢ per pound on the entire lot, and the parties executed a contract of purchase (R. 29). In the contract the goods were described (R. 30) as:

> Scrap Elastic Head Harness Webbing; three crossing straps with clinch tips but without pyroxylin coated cloth centerpiece. To be baled or packed in corrugated boxes w/o sweepings.

The contract further stated (R. 30-31):

> The Contractor agrees to accept all property purchased hereunder "as is" at the time of delivery. The Government makes no guaranty, warranty or representation of the number, quantity, kind, size, weight, quality, character, description or condition of the material or of its fitness for any particular purpose.

However, the contract was disapproved by the Chief of the Chemical Warfare Service because the price was not satisfactory (R. 33). A few days later the Chemical Warfare Service informed petitioner that all head harness elastic webbing scrap was being declared to the Treasury Department at its Chicago and Boston Offices to be disposed of "by negotiation." (R. 35). Petitioner thereupon inquired of the Chicago Treasury Office for information on the material (R. 37-38). In reply, it was told that the Treasury had for sale "15,000 pounds head harness elastic webbing located Keokuk, Iowa." (R. 38). Petitioner requested a sample which was furnished by the Treasury (R. 39-40). The sample was taken from a 10 pound lot of samples sent by the Dryden Rubber Company to the Treasury (R. 40). Unknown to the Government, the sample was not representative of the goods (R. 37, 61). On November 14, 1944, petitioner bid, by letter, 45¢ per pound for the entire lot of "head harness elastic webbing scrap" (R. 41).

Before accepting petitioner's bid, the Treasury, on November 20, 1944, circularized 84 dealers in similar goods, but not petitioner, with an invitation to bid on the goods (R. 51-53). That invitation

described the goods as "7/8" used elastic head-harness from Gas Masks in three crossing strips sewed together. Has iron clinch tip on each of six ends." Under the heading "Condition" appeared the word "Soiled." (R. 52). The highest bid from the dealers so circularized was 25¢ a pound (R. 46) and, consequently, petitioner's bid was accepted (R. 46). While action on petitioner's bid was pending, the Treasury, in response to an inquiry from petitioner as to the status of its bid, (R. 42) informed petitioner that action on its bid was being considered but advised petitioner to increase the amount of the offer (R. 43).

On December 5, 1944, the Treasury accepted petitioner's 45¢ bid and a contract was thereupon executed between petitioner and the Government (R. 48-49). In the contract, the goods were described as "7/8" used elastic head-harness from gas masks in three crossing strips, sewed together. Has iron clinch tip on each of six ends." Under the heading "Condition" appeared the numeral "6" (Ex. 33, following R. 50) which was apparently a code designation used by the Government, the meaning of which was unknown to petitioner (R. 83). The contract was on one sheet, bearing on its face side the notation "Sheet No. 1 of 1 sheets" and subscribed at the foot of the face side. On the reverse side of the sheet under the heading "Conditions" was printed: "1. All property is sold 'as-is' and 'where-is' without express or implied warranty of any kind." At the foot of the reverse side there was a space for the buyer's signature beneath the words "delivery made and property accepted." There was also a blank for

the signature of the contracting officer authorizing the delivery. There were, however, no signatures on the back (Ex. 33, following R. 50).

Three days after petitioner executed the contract, the Treasury in a letter to petitioner, advised it as follows (R. 54):

> Your attention is also directed to the contract conditions on the reverse side of the contract copy, and you are kindly requested to comply with them in all details, especially that section stipulating removal of the property within ten days following receipt of this release.

Subsequently, on delivery of the goods, they were found to be "dirty and stained, curled, twisted and wrinkled and the crossing of the straps [to be] bound by a pyroxylin coated cloth centerpiece." (R. 59). They did not conform to the sample but, the district court found, they did correspond to the contract description—"⅞" used elastic head-harness from gas masks, in three crossing strips, sewed together. Has iron clinch tip on each of six ends." (R. 88.)

Petitioner elected to rescind the sale and promptly demanded return of the purchase price, holding the goods for the Government's account. The Government refused to rescind the sale. (R. 88.)

2. *The "Troy" Contract.*

With respect to this contract, the case was tried upon the deposition of petitioner's president (R.

63-82). The facts are as follows: In April, 1945, the Government, through an officer of the Chemical Warfare Service, United States Army, informed petitioner that it had for sale some "gas mask elastic pieces." (R. 65). The material was represented orally to be clean pieces, about 16 inches long, three of which were stitched together in the center without any pyroxylin or non-elastic webbing sewn on (R. 66). A sample was subsequently furnished to petitioner which corresponded to the oral description (R. 66-67). Petitioner offered to pay 40¢ a pound for the entire lot and the bid was accepted (R. 65, 68). A contract was thereupon executed by the parties which provided in part (R. 12):

> 5. Inspection. Bidders are invited and urged to inspect the property to be sold prior to submitting bids. * * * In no case will failure to inspect be considered ground for a claim.
>
> 6. Sale of Property "As Is". Unless otherwise specified, all property is sold "as is"; the Government makes no guaranty, warranty, or representation, express or implied, as to the kind, size, weight, quality, character, description, or condition of any of the property, or its fitness for any use or purpose; this is not a sale by sample.

The "SCHEDULE OF PROPERTY TO BE SOLD," attached to the contract and forming part thereof, described the property simply as "Head Harnesses." (R. 90).

The contract was to be in effect 90 days, during which the Government was to ship from time to time, and petitioner to receive and pay for, such accumulations of the head harnesses as become available from a specified manufacturing plant "so that," as the contract stated, "valuable storage space will not become occupied with salvage material." (R. 90-91).

Petitioner paid down $1500.00 when the contract was executed and received two shipments, one on May 14 and the other on May 18, 1945, for which it paid on May 17 and May 21, respectively (R. 68-69). After the second shipment, both lots were inspected by the petitioner and found not to be as represented but to be dirty, with pyroxylin coated centerpieces and mixed with much foreign matter resembling sweepings, which was of no value (R. 69-70). Petitioner notified the Government that the shipments were not in accordance with the contract, offered to return them, and demanded the refund of its money (R. 70, 72). The Government's agent assured petitioner that the next lot would correspond to the sample, and told petitioner that he would send a representative to inspect the goods, which petitioner was requested to put aside for that purpose (R. 70, 72). On June 1, 1945, another shipment arrived and petitioner again inspected it and complained (R. 70). On June 18, 1945, a fourth shipment arrived (R. 70). Soon after that, the Government's representative

offered to allow the petitioner a credit for part of the goods, provided petitioner separated the useless part from the rest (R. 73). Following that inspection and offer of credit, petitioner on July 24, 1945, paid in full for all the goods received (R. 74). On July 31, 1945, the Government made a final shipment for which petitioner refused to pay (R. 75).

Petitioner sued in the district court for the amount paid on the "Chicago" contract. The Government counterclaimed for the amount due on the last shipment under the "Troy" contract. Petitioner, in turn, counterclaimed for all monies paid under the latter contract. The district court dismissed the complaint and both counterclaims (R. 100-101). Both parties appealed (R. 128-130) but the Government withdrew its appeal (R. 132). The court of appeals affirmed (R. 143).

ARGUMENT

The issues presented by the petition are essentially factual and the facts have been found against petitioner by both the district court and the court below. This Court has consistently held that in such circumstances it will not review factual questions (*Comstock* v. *Group of Investors,* 335 U.S. 211; *United States* v. *Dickinson,* 331 U. S. 745) and there is no reason for departing from that rule in this case. The asserted conflicts between the decision below and the decisions of the courts of the

State of New York[1] and other United States Courts of Appeals do not exist. No novel question of law requiring authoritative determination by this Court is presented, and a decision by this Court would be significant only to the parties involved. In any event, the conclusion of the court below on the merits is correct and should not be disturbed.

1. *The "Chicago" Contract.*

With respect to the "Chicago" contract, petitioner first contends that the decision below, in giving effect to the "as is" clause printed on the reverse side of the contract, is in conflict with the decisions of the courts of the State of New York. Secondly, it urges that, in any event, the "as is" clause must be denied its ordinary effect because the United States was guilty of fraud and misrepresentation in the formation of the contract. The arguments advanced in support of those assertions are untenable.

a. Petitioner asserts that the decision below, insofar as the court gave effect to the "as is" clause,

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[1] Both parties agreed at the trial that the governing law in this case was the law of New York (R. 84). The district court accepted that opinion. We believe that under the decisions of this Court in *United States* v. *Allegheny County*, 322 U.S. 174, and *Clearfield Trust Company* v. *United States*, 318 U.S. 363, the applicable law is federal law. It has been so held in a case involving contracts for the disposal of surplus property by the Court of Appeals for the Ninth Circuit in *United States* v. *Jones*, 176 F. 2d 278 (C.A. 9). Since, however, the law of New York and federal law coincide in this area, the result does not differ with the choice of law.

is in conflict with *Arthur Philip Export Corp.* v. *Leathertone, Inc.*, 275 App. Div. 102, 87 N.Y.S. 2d 665 (1st Dept.), and *Sturtevant Co.* v. *Fireproof Film Company*, 216 N.Y. 199. A reading of those cases discloses that the asserted conflict does not exist.

In the *Arthur Philip Export Corp.* case, *supra*, the question was whether an agreement to arbitrate, printed as one of a number of clauses on the reverse side of a contract, constituted a part of that contract. Plaintiff claimed that the printed matter had not been called to his attention and that he had not been aware of its existence. Defendant, however, asserted that the parties had had previous dealings in which the same form contract had been used and that plaintiff was aware that the contract provided for arbitration of disputes. Because of the conflicting claims, the court held that the question of whether or not there was a contract to arbitrate was a question of fact for the jury. It consequently reversed and remanded for a jury trial on that issue.

The *Sturtevant Co.* case involved a contract in which certain matter was printed in small type at the bottom of a letter containing the proposal. The question of whether that matter formed part of the contract was raised for the first time on appeal. The New York Court of Appeals held that if the question had been raised at the trial it "would have presented a question of fact to be determined by the jury." (216 N.Y. at p. 203).

Thus, the New York cases do not hold that, as a matter of law, printed material not incorporated by reference into the contract proper is not a part of that contract, but that it is a question of fact in each case as to whether the complaining party can reasonably be thought to have known of the printed provisions. It was that question of fact which both courts below decided adversely to petitioner, and there is, therefore, no conflict between the decision below and the New York cases.[2]

Moreover, there was no error in the holding of the courts below on the factual question. The stipulation of facts upon which the case was tried is silent as to whether petitioner knew of the existence of the printed material. Petitioner did not offer any evidence on this question at the trial, although, by the terms of the stipulation, either party could offer evidence at that time (R. 62). It was, then, reasonable for the courts below to infer that, because of the history of prior negotiations between the parties and the circumstances surrounding the contract of sale, petitioner knew that the sale was to be on an "as is" basis.

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[2] The decision is also consistent with Section 71 of the Uniform Sales Act (N.Y. Pers. Prop. Law, Section 152) which provides:

> Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived, or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

b. The contentions that the United States was guilty of fraud and misrepresentation also present only questions of fact which both courts below have decided adversely to petitioner.

Petitioner's assertions that the samples were "dishonestly selected" (Petition, p. 9) and that "the uncontroverted evidence shows that the seller knew the sample to be not representative" (Petition, pp. 12-13) seem little more than gratuitous calumny when the stipulation, on which the case was tried, plainly stated that "the defendant believed that the goods sold to the plaintiff under the contract would conform to the samples * * *." (R. 61). A complete answer to petitioner's arguments was given by both courts below.

The district court said (R. 89):

> The stipulated facts do not support a finding of bad faith on part of defendant. In disposing of war surplus the Government is not engaged in normal trade and frequently is ignorant of the condition of the goods it sells. Buyers have no right to expect, have notice not to expect, and contract not to expect any warranties whatsoever. Plaintiff had such notice from his prior dealings and so expressly contracted in this transaction. The suggestion that representations made in relation to the cancelled purchase somehow became a relevant part of the Chicago contract has no basis in fact and none in law. Parenthetically it might be noted that insofar as moral issues seem to be presented, there is an astonishing discrepancy between plaintiff's first bid of 78¢ a pound and

its later, accepted bid of 45¢ a pound for what it asserts it thought were identical goods.

Similarly, the court of appeals said (R. 139):

> Consequently any implied warranty that the scrap would correspond to the sample which might otherwise have arisen was displaced by the specific agreement that there should be none. * * * Indeed, this record is instinct with the plaintiff's understanding that the government in effect was saying, "We have 15,000 pounds of elastic scrap which we think is like this sample and would like to know what you will give for it. But you will have to take it as it is and take your chances as to its condition." Under such circumstances the old common law rule of *caveat emptor* applies even now.

Petitioner has had an ample opportunity to persuade the two courts below that the actions of the Government were fraudulent. It has failed. There is, therefore, no good reason why those factual issues should be tried again in this Court.

2. *The "Troy" Contract.*

With respect to the "Troy" contract, petitioner also advances two grounds for review. The first is that the holding of the court below, "that a buyer who receives from the the seller goods not conforming to the contract mixed with goods conforming to the contract is required to segregate the conforming goods from the non-conforming goods" (Petition, p. 2), is in conflict with *Croninger* v.

Crocker, 62 N.Y. 151. The second is that the court below "denied recovery for a conceded breach of contract on the ground that petitioner 'sought no recovery upon such a theory.' " (Petition, p. 3). Petitioner asserts that that holding is in conflict with decisions of other United States Courts of Appeals interpreting the provision of Rule 2 of the Rules of Civil Procedure "that there shall be one form of action to be known as 'civil action'." Here also the asserted conflicts do not exist.

a. The short answer to petitioner's assertion that the decision below conflicts with *Croninger* v. *Crocker, supra,* is that the court below did not hold what petitioner says it held. The *Croninger* case held that the tender of goods, some of which did not conform with the description of the contract, did not constitute a good tender. Far from disagreeing with the decision in that case, the court below followed it and cited it in support of its decision (R. 141). The court held, however, that when petitioner did not reject the goods, but instead accepted them and paid for them on the condition that it receive a credit on future transactions, it could no longer complain that the tender was insufficient. This is the law today in almost every American jurisdiction under Section 44 of the Uniform Sales Act (New York Personal Property Law, Section 125).

b. Similarly, the asserted conflict on the interpretation of Rule 2 of the Rules of Civil Procedure is

based on a misconception of the holding of the court below. That holding was not simply that petitioner "sought no recovery upon such a theory" but that petitioner neither sought recovery on a theory of breach of contract nor proved what damages had been sustained (R. 142). Indeed, the court below stated that the failure to plead and prove damages upon a theory of breach of contract did not "ordinarily * * * justify a dismissal of the complaint, for it [did] not preclude the recovery at least of nominal damages." (R. 142). The court held, however, that nominal damages were not recoverable against the United States. Petitioner does not complain of that holding in this Court.

Petitioner also asserts that the finding of the court that damages for breach of contract were not proved constitutes a ground for reversal and presumably, therefore, for a grant of a writ of certiorari. But here, again, both the district court (R. 92) and the court of appeals have decided a factual question against petitioner and this Court will not disturb their findings (See p. 9, *supra*).

CONCLUSION

For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

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